(1)

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

Garland D. Cherry, Jr.

Petitioner

v.

Edward L. Zucker

Respondent

On Petition for Writ of Certiorari
To The Superior Court of Pennsylvania

PETITON FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

Does it offend due process for a state court to rule that a discharged attorney in a contingent fee case is entitled to no compensation at all for his services where

- he was discharged by the client without cause during the final stages of trial preparation,
- it is undisputed his work was utilized by successor counsel and was instrumental in creating a large recovery for the client, and
- where the only matter in controversy is how much compensation is due?

Was the complete denial of compensation the result of the state court adjudicating discharged counsel's compensation claim in a manner that was fundamentally unfair?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Delaware County Court of Common Pleas appears at **Appendix A** and is reported at 57 Pa. D. & C. 4th 33 (Pa.Com.Pl., 2002).

The Opinion of the Superior Court of Pennsylvania affirming the judgment of the trial court appears at **Appendix B** and is reported at 817 A.2d 1172 (Table) (Pa. Super., 2002).

The Order of Supreme Court of Pennsylvania refusing discretionary review appears at **Appendix C** and is reported at 823 A.2d 143 (Table) (Pa., 2003).

JURISDICTION

The date on which the highest state court decided the case was May 29, 2003. A copy of the Order of the Supreme Court of Pennsylvania denying review appears at **Appendix C**.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Amendment. XIV

STATEMENT OF THE CASE

The following undisputed facts are a matter of record.

Petitioner, a solo Pennsylvania attorney concentrating in prosecuting plaintiffs' personal injury claims was discharged without cause[1] as plaintiff's counsel in a complex cardiac malpractice case a few months before the scheduled trial date. (R. 231a -236a, 244a-245a, 440a). At the time, petitioner had spent several years preparing the case for trial which included overcoming problems relating to jurisdiction, conducting depositions and discovery, and retention and preparation of expert witnesses. (R. 172a-358a, 183a 190a, 194a, 200a-201a, 204a, 206a-207a, 212a-217a, 229a-231a, 239a-242a, 374a-377a, 386a-389a, 416a-420a, 424a-425a). At a pre-trial conference conducted shortly before petitioner's discharge, petitioner advised the court of his belief the case had a potential jury value of several million dollars. (R. 234a).

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[1] The letter of discharge states that respondent had "regrettably lost confidence in [petitioner's] ability to represent [him]...." (R. 440a).

Following petitioner's discharge, the trial court, upon application of the law firm that was substituted as plaintiff's counsel, ordered petitioner to transfer his entire file to the law firm unconditionally.[2] (R. 246a,). Utilizing petitioner's extensive work product including expert witnesses retained and prepared by petitioner, trial counsel from the law firm obtained a 2.7 million dollar jury verdict in the malpractice action. (R. 588a-590a).

Petitioner instituted separate actions against his former client and the law firm based on quasi contractual theories of recovery.[3] Both actions were filed in Delaware County Pennsylvania, where the malpractice verdict was rendered and both compensation actions were adjudicated by the same judge. The action against the law firm was summarily dismissed.[4] In the action against the former client,

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[2] The law firm, a prominent plaintiffs' firm in Philadelphia with a substantial referral practice, advised petitioner they would not pay a referral fee to petitioner because they were obligated to pay a forwarding fee to a lawyer in New York. (See Cmplt. and Amended Cmplt. at par. 20 and R. 8a, 18a, & 35a).

[3] The action against the client was filed after petitioner's discharge and requested compensation based on the anticipated recovery in the malpractice action. The action against the law firm was filed after rendition of the malpractice verdict and sought restitution from the law firm for use of petitioner's work product.

[4] The court granted summary judgment in favor of the law firm and against petitioner holding that petitioner had no cause of action against the law firm as a matter of law. *Cherry v. Weiss*, 18 Del. Co. 117 (2000). The court held that a discharged attorney can obtain quantum meruit compensation only from his former client. The Superior Court affirmed in a Memorandum Opinion. *Cherry v. Weiss*, 754 A.2d 13 (Table) (Pa. Super. 2000). The

the court awarded petitioner his expenses of litigation but nothing at all for his services. Petitioner seeks review by this Court and contends that this action by a state court has deprived him of his property in violation of the Due Process Clause of the Fourteenth Amendment.

In the action against the former client, petitioner sought to prove his contribution to the malpractice action and to obtain compensation based on the results obtained therein. However, the court insisted on adjudicating petitioner's compensation claim while the malpractice verdict was on appeal. The court also refused to rule on a disputed question of Pennsylvania law pertaining to quantum meruit compensation of discharged attorneys. [5]

At trial, petitioner offered his own testimony detailing the extensive work he performed and the risk he undertook as a sole practitioner in preparing

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Pennsylvania Supreme Court refused review. *Cherry v. Weiss*, 568 Pa. 654, 795 A.2d 970 (Table) (Pa. 2000).

[5] The disputed question of law was whether discharged counsel in a contingent fee case is limited to hourly compensation as alleged by respondent or, in an appropriate case, may obtain compensation based on the results of the underlying litigation as alleged by petitioner. Petitioner's request for a pre-trial ruling on this question was denied as a request for an advisory opinion. Despite the trial court's unwillingness to speak to this issue before rendering its verdict, the court acknowledges in its Opinion that a discharged attorney in a contingent fee case is not limited to hourly compensation because "hourly records....are routinely not kept ... [and] there are numerous other factors that may be considered by a court in determining a reasonable fee." (Opinion, Appendix A, pp. 35-36)

the malpractice case nearly to completion before being discharged without cause.[6] There was no evidence or testimony presented to rebut petitioner's claim.[7] Petitioner was precluded from offering evidence of the results of the malpractice trial or the use of his work product therein. This evidence was excluded by the court on hearsay and relevancy grounds. (R. 254a-255a, 381a, 424a- 426a).

At approximately the same time the malpractice verdict became final and a substantial recovery in the malpractice action was assured, the trial court entered an award in the compensation action limited to petitioner's expenses in preparing the malpractice case for trial ($9,467.84) and awarding him nothing at all for his services.

Petitioner filed a motion for post trial relief in which he alleged, in addition to his state law claims, that the court

> "...authorized, committed and caused an 'unlawful taking' of plaintiff's property in violation of due process and state/federal rights by ordering plaintiff to surrender his entire work product to

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[6] On the issue of cause, respondent claimed he changed counsel because of delay in bringing the case to trial and a disagreement with petitioner relating to the issue of damages. (R. 403a-421a). The letter of termination citing a "[loss] of confidence" was apparently written after the respondent met with successor counsel who was critical of petitioner's choice of venue.

[7] In fact, petitioner called respondent as on cross examination who substantially agreed with petitioner's assessment of the risk taken and the work performed by petitioner in preparing the case for trial. (R. 361a-424a).

defendant's trial counsel, permitting its beneficial use by defendant and his counsel in the underlying action, and then refusing to award any compensation whatsoever to plaintiff for his professional services."

(Plaintiff's Concise Statement of Matters Complained of on Appeal, pp. 1-2)

At oral argument on the motion for post trial relief, the post trial judge[8] told petitioner:

"....I don't think there's any dispute here that you did some work in this case to help create the case and put it in a posture to be successfully tried. The next question is how do I evaluate that, or how does any Court evaluate what you did?

(Supp. R., pp. 584b, 585b).

* * *

"We're down to value now of how you evaluate that. I don't think [defense counsel's] going to disagree that you did some work in this case and you got the expert who ultimately testified in this case. I don't know whether it was the only expert, but certainly, presumably, and it sounds like it's reasonable to assume he was instrumental in the ultimate award. I

[8] The trial judge retired following the award and a new judge conducted oral argument and decided the post trial motion.

> don't think that – that's not really in dispute. In dispute is what's the value of that?"
>
> (Supp. R. pp. 589b-590b).

Despite this statement acknowledging petitioner's entitlement to compensation, the request for a new trial was denied. The trial court Opinion, despite its extraordinary length, fails to discuss the underlying facts, the disputed question of law, or tender any explanation for the total denial of compensation.[9]

Petitioner's due process challenge was addressed by the court initially in footnote four of the Opinion which states:

> "It is patently clear from the record that the ruling in question was that of another Judge entirely, during the course of managing an entirely different case, and that error in its issuance cannot be charged to this Court. This Court was not requested to revisit the matter of the surrender of Plaintiff's file, nor could it have passed upon the Order of another trial judge of the same court on an interlocutory matter such as this, had it

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[9] At oral argument on the post trial motion, however, the post trial judge offered the following conjecture as to why the trial judge denied compensation: "…[T]hat might very well have been because you didn't sustain your burden, at least in his view, of substantiating [the] value of what your services were, not so much that you didn't do any preparation in the case to prepare for trial, but that you did not give him some rational basis on which to award you attorney's fees." (Supp. R., pp. 588a-589a).

been called upon to do so."
(Opinion, Appendix A, p. 4, fnt. 4)

The court also addressed the due process issue in its discussion of the court's refusal to grant a continuance:

> "Plaintiff alleges in Paragraph Eight of his Concise Statement that 'the trial court refused to continue the trial, even after plaintiff's witness, John Luchsinger, Esquire (defense counsel in the underlying action), asserted the attorney-client privilege pending appeal of the underlying action.' Plaintiff claims that this refusal operated to deprive him of his federal constitutional right to his day in court and of the ability to prove that he, not successor counsel, was primarily responsible for the successful outcome of the malpractice trial and the creation of any fund that resulted. The record nevertheless evinces that Plaintiff was given four weeks in which to obtain the deposition testimony of Mr. Luchsinger and that of the other witnesses he intended to present to prove his claim for attorney fees. The Trial Court did not deprive Plaintiff of the opportunity to present the testimony of his witnesses, Plaintiff did. The Trial Court did not deprive Plaintiff from proving his claim, the Plaintiff abrogated that responsibility entirely on his own.
>
> (Opinion, Appendix A., pp. 36-37)

The Opinion concludes:

> "The evidence presented by [discharged counsel] during the three days of trial provided a sufficient basis from which the court, exercising its sound discretion, could fairly and justly conclude that [discharged counsel] was entitled to reimbursement from the defendant only for the expense incurred in the underlying action prior to termination of his employment."
>
> (Opinion, Appendix A, p. 38)

Petitioner appealed to the Superior Court of Pennsylvania alleging among other things a violation of due process by the trial court in "refusing to continue.....[the] compensation action pending appeal of the underlying malpractice action." (Brief for Appellant, p. 5, Statement of Questions Involved, No. 3) and "denying discharged counsel any compensation at all for his services and refusing to state its reasons." (Brief for Appellant, p. 5, Statement of Questions Involved, No. 2).

The Superior Court affirmed the trial court in a Memorandum Opinion without discussing the due process challenge, the facts of the case, the disputed question of law, or the complete denial of compensation. See Superior Court Opinion at Appendix B, pp. 40-41.

Petitioner then sought Allowance of Appeal to the Supreme Court of Pennsylvania again alleging a violation of due process by the trial court in "refusing to await the appeal of the underlying malpractice verdict" (Petition, p. 3, Question for

Review No. 2) and "deny[ing] [him] any compensation at all for his services" when only the amount of compensation was in controversy. (Petition, p. 3, Question for Review No. 1). The Pennsylvania Supreme Court denied review by Order dated May 29, 2003. (Appendix C, p. 40)

REASONS FOR GRANTING PETITION

I. SUBSTANTIVE DUE PROCESS

THE COMPLETE DENIAL OF COMPENSATION AFTER THE COURT ADMITTED THAT COMPENSATION WAS DUE AND THAT ONLY THE AMOUNT THEREOF WAS AT ISSUE IS ARBITRARY, IRRATIONAL AND SHOCKS THE CONSCIENCE

The Fourteenth Amendment states in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const., Amdt. 14.

Historical recognition of a property interest in the fruits of one's labor predates Anglo-American jurisprudence.[10] Protected property interests are

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[10] John Locke, *The Second Treatise of Government* ¶ 27 (1690) ("[Y]et every man has a property in his own person.... The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property").

created by state law, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), but federal constitutional law determines whether the interest created by state law rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978). The term "property" within the constitutional guaranty has been broadly defined and includes various species of intangible property including contract rights and causes of action. 16 C.J.S., Constitutional Law, Section 984; 16A C.J.S., Constitutional Law, Section 507, p. 610. An existing right of action is a vested property right. 16A C.J.S., Constitutional Law, Section 260.

Petitioner's entitlement to reasonable compensation for his labor is a protected property interest arising under state law from his contingent fee agreement with respondent and the substantive law of Pennsylvania pertaining to quantum meruit compensation of attorneys. This Court has held that any significant deprivation of property by the State is within the purview of the Due Process Clause. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). In the instant case, the deprivation is more than significant; it is a complete deprivation of a substantial property interest.[11] The suggestion by the trial court that petitioner is being

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[11] Petitioner's work product substantially contributed to a molded malpractice verdict of approximately 2.2 million dollars. *Zucker v. Doherty*, 86 Del. Co. Rep. 98 (1999). The verdict was upheld on appeal. *Zucker v. Doherty*, 748 A.2d 1262 (Table) (Pa. Super. 1999).

ungrateful[12]and has already prevailed in the compensation action by virtue of the $9,467.84 award representing his expenses of litigation is an affront.[13] The law's abhorrence of a forfeiture is deeply rooted and requires no citation of authority. Yet, that is the effect of the trial court's ruling and what has been sanctioned by the Pennsylvania appellate courts without any discussion of the merits of petitioner's claim.

Forfeitures, like punitive damage awards, involve the outright taking of property without compensation, a form of state action this Court has monitored closely for possible due process violations. See e.g., *State Farm Mut. Ins., Co., v. Campbell*, 123

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[12] As previously noted, the court observed in post trial proceedings that petitioner made a valuable contribution to the malpractice case and was deserving of compensation. Yet, sixteen months later the same judge issued an Opinion which disparages petitioner to the extreme: "ongoing confusion" (App. A, p. 8), "satisfied with nothing less (App. A, p. 8), "mystifying" (App. A, p. 14, fnt.7), "next creative tactic" (App. A, p. 18), "recalcitrant refusal" (App. A, p.25), "smacks of disingenuity" (App. A, p.27), "serpentine battle" (App. A, p. 32), "utterly baseless" (App. A, p.34), "ridiculous" (App. A, p.35), "utterly unfounded" (App. A, p.36), "self-serving accusation" (App. A, p.36). See *Brock v. Thompson*, 1997 Ok 127, 948 P. 2d 279 for an illustration of the hostility that has developed towards tort lawyers in recent years. See also Adjudicatory Independence and The Values of Procedural Due Process, 95 Yal. L. J. 455 (1986) for a discussion of the importance of a fair and independent adjudicator to the due process guarantee.

[13] "...Plaintiff wants merely to proceed with a claim he has already established, against a Verdict he has already won.....the relief sought here has already been awarded, ..." (Trial Court Opinion, Appendix A, pp. 38-39)

S. Ct. 1513, 155 L.Ed. 2d 585 (U.S. 2003); *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U. S. 424, 121 S. Ct. 1678, 149 L.Ed. 2d 674 (2001).

Even where a forfeiture for criminal wrongdoing is constitutionally permitted, this Court has been vigilant in making sure the deprivation of property is not excessive and is proportional to the culpability of the wrongdoer. *U.S. v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L.Ed. 2d 314 (1998)("Full forfeiture" of money involved in crime of failure to report exported currency deemed unconstitutional under Excessive Fines Clause of Eighth Amendment).

Mulholland v. Kerns, 822 F. Supp. 1161 (E.D. Pa. 1993), dealt with the issue of forfeiture of property in the context of a discharged attorney seeking compensation for services. The clients contended the attorney was discharged for good cause and was therefore not entitled to any compensation for his services. The district court agreed there was good cause for the termination but rejected the contention the attorney was not entitled to any compensation under Pennsylvania law:

> "[The former clients] have cited no authority suggesting that anything less than criminal wrongs would result in a complete denial of compensation. The court has found no authority suggesting that anything less than illegal or immoral conduct would result in a complete denial of compensation."
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> 822 F. Supp. at 1168.

In the instant case, petitioner was not discharged for good cause. Respondent was exercising his unfettered right to change counsel. In fact, respondent's trial testimony was in substantial agreement with that of petitioner regarding petitioner's risk-taking and extensive pre-trial preparation.[14]

In the absence of any rational basis for the complete denial of compensation, it must be presumed to be arbitrary and irrational. The capricious nature of the court's decision is plainly demonstrated by a comparison of the court's frank admission during post trial proceedings that petitioner was entitled to be compensated for his services followed almost immediately by the denial of his post trial motion.[15] To award petitioner nothing at all for more than four years of professional service shocks the conscience and violates substantive due process.

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[14] Petitioner was precluded however, from eliciting testimony from respondent regarding the use of petitioner's work product at the malpractice trial case and the resulting benefit to the case. (R. 424a-426a). The Trial Court Opinion offers the following justification for the exclusion of this evidence: "...the Trial Court cannot be faulted for limiting Plaintiff's attempt to elicit testimony of this nature from the Defendant, because [respondent], who is not an attorney himself, was neither qualified to evaluate those efforts, nor to testify on such a matter of law. (Opinion, Appendix A, p. 25)

[15] The oral argument took place on August 8, 2000 approximately six months after the malpractice verdict was upheld on appeal. The post trial motion was denied by Order dated August 17, 2000.

II. PROCEDURAL DUE PROCESS

THE DENIAL OF COMPENSATION RESULTED FROM A PROCEDURE THAT WAS FUNDAMENTALLY UNFAIR

What procedure did the trial court utilize in conducting the adjudication? The answer to that question is at the root of the court's decision.

The record consists almost exclusively of petitioner's testimony and the corroborating testimony of respondent. As previously noted, both are in substantial agreement that petitioner's services were vital to the ultimate success of respondent's malpractice case. See footnote 7, supra.

The trial court Opinion states that petitioner filed suit too early. The court implies that it was unreasonable for petitioner to expect the court to wait for disposition of the malpractice case before adjudicating petitioner's compensation claim.

> "It is abundantly clear from all the facts and circumstances of this case that Plaintiff filed suit too early, and that, had he waited a longer period of time, he would not have had to wage the serpentine battle he's waged to prevent the estinguishment (sic) of the light on his claim of eligibility for a portion of the underlying recovery. Plaintiff's services were terminated by the

> Defendant by letter dated in February of 1995. The verdict in the malpractice case was delivered in May of 1997. Plaintiff initiated the instant action only a month later, when he could have waited until February of 1999 to initiate suit and continue to be engaged in litigation thereof when the jury's verdict was upheld by the Pennsylvania Superior Court in December of 2000."
>
> (Opinion, Appendix A, p. 32)

Notwithstanding its misstatement of facts,[16] the court's intent is clear. Because petitioner filed his compensation claim too soon after his discharge, he forfeited his right to have the court consider the results of the malpractice case and to have his compensation based thereon. The appellate court concluded that the trial court record provided an insufficient basis for an award of compensation but declined to discuss how, *and more importantly why*, the record was deficient.[17]

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[16] In fact, it was petitioner's unjust enrichment action against successor counsel that was filed a month after the malpractice verdict was rendered. The instant compensation action against respondent was filed in March of 1996, approximately one year after petitioner was discharged. The malpractice verdict was upheld on appeal and became final in early 2000 approximately six months before the Order denying post trial relief.

[17] The Superior Court Opinion states:

> "[Petitioner] had his day in court, at which he was permitted to litigate his case in any proper, available

The procedure employed by the trial court was fundamentally flawed. The court held that because petitioner filed suit too early, it was unreasonable for him to expect the court to delay the proceedings pending disposition of the malpractice action. In effect, the court ruled that its interest in clearing its docket outweighed petitioner's interest in a full and fair adjudication. In the absence of hourly records - which petitioner was not required to keep, and in the absence of any opportunity to prove the value of his services to the success of the malpractice action, petitioner lacked reasonable means to prove his claim with the degree of specificity the law requires.

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The fundamental requirement of due process is a hearing that is "meaningful," *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965), and "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). A balancing of competing interests will determine what

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manner and at which he introduced all the competent evidence he had. The trial court gave him the only verdict available on the evidence before it,...." (Opinion, Appendix B, p. 41)

procedure is due. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18(1976). That determination in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected. *Cafeteria Workers* v. McElroy, supra; *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The degree of potential deprivation that may be created by a particular decision is a factor to be considered in determining what process is due. C.f., *Morrissey v. Brewer*, supra.

In the instant case, the court's interest in clearing its docket did not outweigh petitioner's interest in having a full and fair adjudication to determine the value of his services. Petitioner waited a year before filing the action against respondent and requested compensation based on the results obtained in the malpractice action. Petitioner had no way of knowing that the trial of the malpractice action would be delayed for more than two years while his compensation action languished on the court's docket. The administrative burden on the court of postponing the adjudication pending the outcome of the malpractice action was small in relation to the loss faced by petitioner by the court's failure to do so.

Moreover, inasmuch as the trial court did not consider petitioner's contribution to the malpractice action, how did it perform the comprehensive analysis required by Pennsylvania law in determining a reasonable quantum meruit legal fee? Trial Court Opinion admits:

> "It is settled law that a ten factor test is to be applied in determining the amount

of any quantum meruit recovery, i.e., (1) the amount of work performed; (2) the character of the services rendered; (3) the difficulty of the problems involved; (4) the importance of the litigation; (5) the amount of money or value of property in question; (6) the degree of responsibility incurred; (7) whether the fund involved was created by the attorney; (8) the professional skill and standing of the attorney in his profession; (9) the results he was able to obtain; and (10) the ability of the client to pay a reasonable fee for the services rendered." (Opinion, Appendix A, p. 34)

Although the court acknowledges these factors in its Opinion, there is no evidence even remotely suggesting they were applied to the facts of the case. The record is devoid of any evidence to support the result reached by the court.

"The purpose of the due process provisions, as they relate to judicial procedure, is to insure fundamental fairness and adherence to fundamental principles of justice and fair play." 16C C.J.S., Constitutional Law, Section 964, pp. 228-229. "It is not a guaranty that every court ruling shall be correct, or that every decision reached will be factual or just, but it is a guaranty that the fundamental principles of justice shall not be violated, and that a decision will be reached by processes which are fair." 16C C.J.S., Constitutional Law, Section 964, p. 232. "... [T]he decision-maker's conclusion....must rest solely on the legal rules and evidence at the hearing.....To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the

evidence he relied on….. And, of course, an impartial decision maker is essential." *Goldberg*, supra, 25 L. Ed 2d at p. 301. There must be an adjudication of the same nature as is present in other cases. *Petition of Kariher*, 284 Pa. 455, 131 A. 265 (1925). Due process does not mean according to whim, caprice, or personal judgment. 16C C.J.S., Constitutional Law, Section 968, p. 263, fnt. 90 and cases cited therein.

There was no dispute between the parties that petitioner's services were valuable and that some compensation was due. The court acknowledged this in open court in post trial proceedings. Despite this, the court denied any compensation to petitioner apparently because, in the court's view, it did not have a sufficient record before it upon which to make a definitive award of compensation – a deficiency in the record which the court created by its own ruling. The denial of compensation resulted from a denial of procedural due process.

CONCLUSION AND PRAYER

The decision of the state courts below is an infringement of petitioner's right to substantive and procedural due process of law guaranteed under the Fourteenth Amendment to the United States Constitution. Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari.

Respectfully Submitted,
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APPENDIX

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

GARLAND D. CHERRY, JR., ESQUIRE : NO. 96-2625

:

V.

:

EDWARD L. ZUCKER

GARLAND D. CHERRY, JR., ESQUIRE, Plaintiff, representing himself.
GARY C. BENDER, ESQUIRE, Attorney for the Defendant.

OPINION

BURR, J. FILED: 1-18-02

The Plaintiff, Garland D. Cherry Jr., Esquire, appeals from the denial of his post-trial motion in this action to recover compensation for services rendered prior to his dismissal from representing the Defendant in an underlying medical malpractice lawsuit.[1]

The Plaintiff and the Defendant, Edward L. Zucker, entered into a contingency fee agreement on November 21, 1990, whereby Defendant employed

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1 The Honorable Clement J. McGovern Jr. was formerly the judge to whom the above-captioned matter was assigned. Judge McGovern, who has since retired, presided at trial, entered the verdict in the case and contributed to the drafting of this opinion. The undersigned judge entered the order upon which this appeal is based and has completed and filed this opinion.

the Plaintiff to represent him in prosecuting a medical malpractice action against John U. Doherty M.D., and Paul Jennings M.D. The alleged negligence of Drs. Doherty and Jennings in diagnosing and treating Mr. Zucker's supraventicular tachycardia (SVT) of the heart, purportedly caused Zucker to pass out at the wheel of his car and become injured in an ensuing automobile accident on January 17, 1989, and thus lose a promising professional basketball career. The agreed upon compensation for Plaintiff's services for prosecuting Defendant's lawsuit was a third of the gross amount recovered by way of a settlement, or 40 percent of the gross recovery following commencement of a trial. Defendant also agreed to pay for all expenses incurred by Plaintiff in preparing the case for trial, "not limited to costs and fees associated with conducting an investigation, filing suit, obtaining records and reports, deposing witnesses, hiring experts, etc." The agreement states that "[t]hese expenses will be initially advanced by Mr. Cherry, but he will be entitled to reimbursement of these expenses in full, separate and in addition to his fee, if and when there is a recovery in our case." The agreement provides that Defendant was not obligated to reimburse Plaintiff's expenses if there were no recovery in the case. (See contingency fee agreement, trial exhibit P-1.) Plaintiff maintains that his representation of Mr. Zucker actually commenced a year before the agreement was signed, in "September or October of 1989," and continued until the date of a termination letter from Mr. Zucker dated February 21, 1995. (4/23/99 N.T. 86).

In an Amended Complaint filed on May 30, 1996, Plaintiff pleaded his intention to assert a lien on any proceeds recovered in the malpractice action, and "alternatively, if there is no recovery in the

malpractice action, [P]laintiff still seeks quantum meruit recovery for the reasonable value of his professional services rendered to [D]efendant up to the date of discharge plus expenses of litigation." (Amended Complaint, Paragraphs 29 and 30.) Plaintiff presented a bill at trial for the foregoing expenses in the amount of $9,467.84. (4/23/99 N.T. 82-83; Plaintiff's Costs and Expenses - Trial Exhibit P-7; See also, Defendant's Motion for Compulsory Nonsuit and/or Summary Judgment).[2] Plaintiff testified that he has never been reimbursed for the expenses he put forth in the underlying litigation. (4/23/99 N.T. 84-85). Plaintiff stated that he had never kept any diaries or calendars or billing records or any other written records that would substantiate the amount of time spent on tasks relative to his representation of Mr. Zucker. (4/23/99 N.T. 154). Plaintiff presented a "chronology" of milestones in the malpractice case, beginning with the automobile accident on January 17, 1989, through his termination in February of 1995.

Plaintiff filed the underlying lawsuit, Zucker v. Doherty, et al., captioned at number 91-291, in the Delaware County Court of Common Pleas, by writ on

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[2] Defendant filed a post-trial Motion for Compulsory Nonsuit and/or Summary Judgment in which he agreed to reimburse the pleaded costs with the exception of payments to New Jersey counsel, Tobin Schmesser, Esquire, in the amount of $2,405; to paralegal, Janet McCrossen, in the amount of $463.50; and paralegal, LaVera Van Atter, in the amount of $507.50. Defendant then stipulated and consented to a judgment entered against him for reimbursement of Plaintiff's costs in the amount of $6,091.84. (Defendant's Motion for Compulsory Nonsuit and/or Summary Judgment, Paragraphs 16-18).

January 9, 1991.[3] The case docket reflects Plaintiff's filing of a praecipe to withdraw his appearance for the Defendant, Mr. Zucker, some four years later, on March 29, 1995. The docket also indicates that Mr. Zucker moved in that matter on June 29, 1995, to compel the within Plaintiff to produce Defendant's case file to successor counsel. The Honorable Maureen Fitzpatrick granted Defendant's Motion in an Amended Order issued on July 18, 1995.[4] The medical malpractice action then proceeded to trial in the spring of 1997, before the Honorable R. Barclay Surrick, formerly of this court, some two years after

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[3] The action was also filed in New Jersey state court due to concerns related to obtaining jurisdiction over the defendant doctors. That action was later withdrawn by agreement of the parties, and litigated solely in the Court of Common Pleas of Delaware County, Pennsylvania. (4/23/99 N.T. 37-38, 179-80, Trial Exhibit P-18).

[4] It is here noted that in Paragraph 11 of his Concise Statement, Plaintiff alleges that this Court issued that ruling, causing a violation of Plaintiff's constitutional rights in permitting Mr. Zucker and his subsequent attorneys to unlawfully take Plaintiff's entire work product, and then "refusing to award any compensation whatsoever to Plaintiff for his professional services." It is patently clear from the record that the ruling in question was that of another judge entirely, during the course of managing an entirely different case, and that error in its issuance cannot be charged to this court. This court was not requested to revisit the matter of the surrender of Plaintiff's file, nor could it have passed upon the Order of another trial judge of the same court on an interlocutory matter such as this, had it been called upon to do so. Kenis v. Perini Corp., 452 Pa. Super. 634, 682 A.2d 845 (1996); Prime Properties Development Corp. v. Binns, et al., 397 Pa. Super. 492, 580 A.2d 405 (1990); Reifinger v. Holiday Inns Inc., 315 Pa. Super. 147, 461 A.2d 839 (1983).

Plaintiff's withdrawal from representing Mr. Zucker. A jury awarded damages to Mr. Zucker in the amount of $2.7 million on May 27, 1997. The underlying defendant, Dr. Doherty, filed a motion for post-trial relief on May 29, 1997. It was at this juncture that plaintiff filed his action to recover attorney compensation against the attorneys and law firm that successfully prosecuted the medical malpractice action to verdict. That action, captioned Cherry v. Weiss, et al., at number 97-7915, was filed in the Delaware County Court of Common Pleas on June 2, 1997.[5]

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[5] Plaintiff's action against successor counsel was dismissed by Judge McGovern on the defendants' motion for summary judgment, on grounds that an action in quantum meruit cannot be maintained by a dismissed attorney against successor counsel. Cherry v. Weiss, et al., 118 Del. Co. 117 (2000), aff'd, 754 A.2d 13 (Pa. Super. 2000)(Table), app. den., 2000 WL 987134 (Pa. 2000). Under the law, such an action must instead be brought against the former client. Fowkes v. Shoemaker, 443 Pa. Super. 343, 661 A.2d 877 (1995); Styer v. Hugo, 422 Pa. Super. 262, 619 A.2d 347 (1993), aff'd, 535 Pa. 610, 637 A.2d 276 (1994). Judge McGovern's Order granting that motion for summary judgment was affirmed by the Pennsylvania Superior Court, and the Pennsylvania Supreme Court subsequently declined to review the decision. An additional issue decided adversely to the Plaintiff in Cherry v. Weiss, et al., supra, was his alleged entitlement to discovery of the work product of subsequent counsel in the underlying medical malpractice action so as to determine therefrom the relative contribution of each attorney to the successful outcome. The Pennsylvania Superior Court noted in footnote 2 on page four of its memorandum opinion filed on February 9, 2000, affirming the trial court's denial thereof, that no Superior Court case has supported an award to discharged counsel based upon a comparison of the relative workload

Judge Surrick denied Dr. Doherty's Motion for Post-trial Relief in the medical malpractice action on December 31, 1997. On January 22, 1998, Judge Surrick molded the jury's award to $1,755,000 to reflect the jury's finding of 35 percent contributory negligence on Mr. Zucker's part, and granted Delay Damages to Mr. Zucker in the amount of $523,666.78, bringing the total amount of the verdict recovered in the underlying action to $2,278,666.78. Judgment on the molded verdict was entered in the trial court on February 6, 1998. Notice of Dr. Doherty's appeal from denial of his post-trial motions was filed on February 23, 1998, along with an appeal bond in the amount of $1,534,400.14. Judge Surrick filed his opinion on January 25, 1999. The Superior Court's order affirming Judge Surrick's denial of Dr. Doherty's Post-Trial Motion was filed on December 13, 2000, some 14 months following conclusion of trial in the instant case. There was no appeal from that decision.

Trial in the instant action commenced on April 22, 1999, with a request from Plaintiff for a new trial listing, thus carrying on a delaying process that began after the first listing of this case for trial on November 7, 1997, when Plaintiff asked for the matter to be removed from the list because it had settled. (4/22/99 N.T. 3-4, 28-29). However, after the

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of different lawyers on a case, citing Hiscott and Robinson v. King, 426 Pa. Super. 338, 626 A.2d 1235 (1993), alloc. den., 537 Pa. 641, 644 A.2d 163 (1994). That statement of the law remains unchanged, and the issues raised in paragraphs 2, 3 and 7 of Plaintiff's Concise Statement, alleging refusal by the Court to permit discovery or allow trial evidence relative to such a comparison are completely lacking in merit.

parties' notification to the Court of their rescission of the settlement agreement, Plaintiff's case was called to trial on March 16, 1998. Nevertheless, on that date, after a jury panel was seated, but before it was sworn, Plaintiff requested and was granted another continuance in order for discovery to proceed. The case was subsequently rescheduled for trial on July 27, 1998, but Plaintiff again requested a continuance pending completion of the appeal in the underlying case on grounds that there was no fund or "res" before the court from which the fees in dispute could be distributed to the Plaintiff. Plaintiff also sought, at this time, consolidation of this action with the above-mentioned case of Cherry v. Weiss, et al., supra. That motion was denied and trial was rescheduled for January 4, 1999. Plaintiff then requested that the case be removed from the January list because he had pre-purchased nonrefundable airline tickets for a vacation in Florida from January 12 through January 23, 1999.

Trial was rescheduled for the term beginning February 8, 1999, at which time plaintiff filed a Motion Seeking Clarification of the Law of Quantum Meruit by Discharged Counsel, asking the court to determine for him whether a discharged attorney seeking quantum meruit compensation may recover a proportionate share of the fund he helped create, or whether he is limited to relief in the form of hourly compensation only. The Motion was denied by Order dated March 5, 1999, because it was deemed inappropriate for the court to provide plaintiff, a licensed, experienced and practicing attorney, with such a determination, inasmuch as plaintiff was, indeed, quite capable of arriving at such clarification himself following research of the applicable law. Trial was rescheduled for the term beginning April 10, 1999. It is here noted that the wording of the

Motion for Clarification evinces Plaintiff's ongoing confusion regarding the nature of this remedy, the sort of evidence that should be proffered in such a case, and the factors the court may consider in making an award for services rendered by an attorney in an action for quantum meruit. It is also reflective of Plaintiff's intent to recover a significant portion of the judgment awarded to Mr. Zucker in the underlying malpractice action, and to be satisfied with nothing less.

Testimony finally began in the case on April 22, 1999. During the first day of trial the Plaintiff again insisted that the trial court decide whether he should pursue an action in quantum meruit to recover a portion of the recovery in the medical malpractice action, or pursue an equitable attorney's charging lien claim. (4/22/99 N.T. 3-78; 4/23/99 N.T. 3-6). Judge McGovern was equally insistent in declining to choose what theory of recovery plaintiff should pursue at trial. Plaintiff ultimately decided to pursue an equitable charging lien claim before the court sitting without a jury. (4/22/99 N.T. 27-41, 51-70; 4/23/99 N.T. 3-6). Plaintiff then presented his own lengthy testimony regarding the services he performed and the expenses he incurred while preparing the underlying medical malpractice case for trial on the theory that the failure of Mr. Zucker's treating physicians to diagnose and treat his SVT caused him to pass out while driving and crash his vehicle, incurring injuries that put an end to an incipient professional basketball career.

Plaintiff testified that his services prior to trial of Mr. Zucker's case included finding expert witnesses who would provide reports and testimony supportive of this theory of recovery, and that this

had been difficult to achieve. (4/23/99 N.T. 7-75, 172-75, Trial Exhibits P-11 to P-13). Plaintiff testified that the largest portion of his expenses were incurred in initially bringing suit in both Pennsylvania and New Jersey courts so as to obtain personal jurisdiction over the underlying defendants, and in tracking down and interviewing the numerous trial and expert witnesses he planned to present at trial. (4/23/99 N.T. 7-75, 176-177; Trial Exhibit P-17). Plaintiff said that none of the foregoing expenses had ever been reimbursed. (4/23/99 N.T. 84-85). Plaintiff proffered a table listing those expenses, totaling $9,467.84. (Trial Exhibit P-7). Plaintiff said that it was impossible for him to ascertain the number of hours he had spent in preparing the malpractice case for trial. (4/23/99 N.T. 163).

Plaintiff testified to attending a number of pretrial conferences with Judge Fitzpatrick with the aim of moving the case to trial, and to having obtained numerous continuances from her and Judge (now President Judge) Clouse of this court beginning in November of 1993, in order to complete discovery, particularly with respect to the potential positive effect of a successful heart ablation procedure[6] on Mr. Zucker's subsequent athletic abilities, i.e., the damages portion of Mr. Zucker's case. (4/23/99 N.T. 66-79, 127-28, 139-41, Trial Exhibits D-2, D-3, D-4, D-7). Plaintiff maintained that another reason for delay was his desire to have Mr. Zucker "ablated" so that Zucker could feel better about himself and that he could have a credible damages claim. (4/23/99

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[6] Ablation is defined in Stedman's Medical Dictionary, 25th Ed. (1990), as surgical removal of a noxious or offending substance, in this instance tissue, the presence of which caused Mr. Zucker's heart to beat irregularly.

N.T. 133). The credibility issue arose from plaintiff's feeling that he could not present a credible claim to the jury in April of 1994 that Zucker had SVT and was in danger of sudden death from playing basketball without the corroborating testimony of a medical expert, but that the expert already retained held a contrary opinion. (4/23/99 N.T. 134-36). Plaintiff contended that subsequent to Zucker's having the ablation surgery in August of 1994, he had difficulty obtaining from Zucker the names of sports witnesses who would attest that the injuries suffered put an end to his European basketball career, because Zucker had become "incommunicado" with him and unresponsive to requests for authorizations to obtain medical records and for the names of sport witnesses. (4/23/99 N.T. 70, 77-78, 185-186; Trial Exhibits D-8 and D-9). Plaintiff testified that, in his view, the case was not ready for trial until he had received a supplemental expert report in February of 1995 supporting his theory of the case. (4/23/99 N.T. 160, 184, Trial Exhibits P-16 and P-20). Plaintiff blames the delay on Mr. Zucker's reluctance to obtain an appointment and be examined by the expert. (4/23/99 N.T. 162-165). Plaintiff said that after he had finally obtained the names of the sports witnesses from Mr. Zucker and while he was in the process of contacting them and providing their names and potential testimony to the defense, he received the letter of termination from Mr. Zucker also in February of 1995. (4/23/99 N.T. 70; Trial Exhibit P-6).

Plaintiff indicated that he had not attended the trial nor otherwise assisted with the prosecution of the underlying medical malpractice action after he was terminated from representing Mr. Zucker. Plaintiff said that he could remember having malpractice cases prior to his retention by Mr.

Zucker, and subsequent to his termination, but could give specific information about only one of them. (4/23/99 N.T. 96-99). Plaintiff testified that there was never an issue between him and Mr. Zucker arising from the payment for services of New Jersey counsel, Mr. Schmesser, and New Jersey paralegals, Ms. Van Atter and Ms. McCrossen. (4/23/99 N.T. 108-115).

Defendant, Mr. Zucker, testified that plaintiff was the first and only attorney he had spoken with before hiring Plaintiff to represent him in the malpractice case, and that he had done so on the recommendation of a college friend. (4/23/99 N.T. 196-199). Mr. Zucker indicated that he was told by the plaintiff early on that he was not licensed to practice law in the state of New Jersey. (4/23/99 N.T. 200-201). The Defendant said that he did remember working with the Plaintiff to find medical witnesses who would review the Defendant's chart and put together the malpractice case before the two-year statute of limitations ended. (4/23/99 N.T. 201-212). Mr. Zucker indicated that he also recalled the necessity of filing a back-up action in New Jersey state court, and that there were expenses involved in that effort, but said that Plaintiff had never discussed them with him. (4/23/99 N.T. 212-13, 216-17). The Defendant said he recalled the difficulties involved in finding an expert medical witness who would support his theory of the case that the failure to diagnose SVT and medicate him properly caused the car accident and ended his basketball career. (4/23/99 N.T. 220-23, 231-32, 235). The Defendant also stated that he and the Plaintiff sometimes went for months without speaking to one another. (4/23/99 N.T. 226). The Defendant said that he had been reluctant to undergo the ablation procedure advocated by the Plaintiff because he was competitive athletically when taking

only medication, and the injuries suffered in the accident were merely orthopedic in nature. (4/23/99 N.T. 229).

The Defendant testified that he had expressed some concerns to the Plaintiff about the delay after the case had been "pushed back" a few times, and because Plaintiff seemed reluctant to push the issue of the loss of his basketball career, and thus appeared to be undermining the amount of damages available in the case. (4/23/99 N.T. 238-40). The Defendant testified that he had concerns about Plaintiff's preparedness to go forward, even after an expert was retained in the case, and that he had expressed these to the Plaintiff on several occasions, although not in writing. (4/23/99 N.T. 242-43). The Defendant said that his decision to undergo the ablation procedure was a personal decision made with his wife, and that it had nothing to do with the case. (4/23/99 N.T. 246). The Defendant terminated Plaintiff's services by letter dated February 21, 1995, and retained new counsel who pursued the matter through trial and who achieved the multi-million dollar verdict in 1997 utilizing the expert obtained through Plaintiff's and the Defendant's efforts. (4/23/99 N.T. 79, 87, 257; trial exhibit P-6). Plaintiff's suit against new counsel was initiated on June 2, 1997, just after entry of the verdict, and alleged malicious interference with contractual relations and defamation, with a claim for quantum meruit damages assessed against the fee to be generated by successful prosecution of the medical malpractice action. Judge McGovern's dismissal of that suit on the Defendants' Motion for Summary Judgment, as has been hereinabove noted, was upheld on appeal.

Prior to the adjournment of testimony on April 23, 1999, Plaintiff complained that, since the

court had not granted a trial continuance as Plaintiff had expected, he was unable to present further testimony or evidence at that time, and asked if he could do so the following Monday. (4/23/99 N.T. 261). The court explained that a jury trial in another case had been scheduled for that date. (4/23/99 N.T. 262). Plaintiff then stated his intention to call as witnesses the New Jersey attorney, a Mr. Fletcher, whom he had employed prior to his dismissal from representing Defendant in the medical malpractice action, as well as the two attorneys who had represented the Defendants in the malpractice case, but that he had been unable to secure their attendance by way of telephone calls made that morning and on the preceding day. (4/23/99 N.T. 262-64). Counsel for the Defendant stated, without objection from the Plaintiff, that he was having difficulty deciding which witnesses to call, inasmuch as Plaintiff had "changed his whole theory with respect to this case," but that he was also considering the presentation of the attorneys who had represented Mr. Zucker in the malpractice action. (4/23/99 N.T. 267). Plaintiff then said he planned to review some of the underlying deposition transcripts to determine whether he would include them as part of his case. (4/23/99 N.T. 267-68). The proceedings then adjourned with the court's announcement that counsel would be notified when trial would reconvene.

The court received, on April 26, 1999, a letter from Plaintiff wherein he requested the transcription of robing room proceedings during which Plaintiff again reiterated his request that the Trial Judge provide the foregoing "clarification of the law of quantum meruit," with that request once again being denied for the reason hereinabove stated. Plaintiff went on in the letter to say he intended to call as

witnesses counsel for the defendant, Dr. Jennings, in the medical malpractice action, the Defendant Mr. Zucker's attorney in the malpractice suit, and to present the deposition testimony of Defendant's attorney in the malpractice action, and/or other members of that attorney's law firm. Plaintiff expressed concern with the court's desire to move the case forward despite the absence of a "res" allegedly required for the imposition of an attorney's charging lien, because Plaintiff had the impression that the focus of the proceeding was now to make an equitable division of the recovery in the malpractice case. Plaintiff expressed his concern with rulings excluding evidence of subsequent counsel's use of Plaintiff's work product, because, in Plaintiff's view, equitable division of the proceeds of the underlying verdict would be impossible without a detailed examination of the efforts expended by Plaintiff and replacement counsel. The trial Judge responded by letter that it declined to proceed with litigation of this case through the mail. Following the granting of a continuance requested by counsel for the Defendant of the relisted trial date of July 19, 1999, and Plaintiff's request for a date certain in order for him to have less difficulty in coordinating the testimony of his projected witnesses, trial was specially listed to resume on October 7, 1999.[7]

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[7] It is here noted that Plaintiff, in an answer filed on February 23, 1999, to Defendant's Motion to Preclude Expert Testimony, said he would call one Marvin Ellin, Esquire, as his expert witness at trial. Defendant's Motion was denied. However, Mr. Ellin's name was never subsequently submitted to the Court as a potential trial witness, nor was he ever called to testify for the Plaintiff. Therefore, Plaintiff's claim that he was unable to present a trial expert in this action is, indeed, mystifying.

During the month of August 1999, Plaintiff informed the court that he was having difficulty arranging for the appearance of his witnesses at trial, and Mr. John Luchsinger, counsel for the Hospital of the University of Pennsylvania, Dr. Doherty's employer, informed the court directly that HUP would not waive its attorney-client privilege in order for Mr. Luchsinger to testify for the Plaintiff in this action. Moreover, during the interim between the conclusion of testimony on April 23, 1999, and resumption of trial on October 7, 1999, Plaintiff litigated a petition filed with the Pennsylvania Superior Court to stay the instant action pending resolution of the appeal in the underlying malpractice case and of Plaintiff's appeal of this Court's granting of summary judgment to successor counsel in Plaintiff's action to recover a portion of the recovery in the malpractice case from them. Plaintiff complained in the stay petition that, if the present action were not stayed, he would be forced to fully litigate the controversy in this Court as an equitable charging lien, and the case against successor counsel would become moot. (Plaintiff's Petition for Stay of Lower Court Proceedings, filed in Cherry v. Weiss, et al., No. 97-7915, Paragraph 6.) The Superior Court filed an order dated October 5, 1999, denying the Petition for Stay, citing the case of Pa. Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983) (grant of stay pending appeal must be warranted by a strong showing that petitioner is likely to prevail on the merits; that without requested relief he will suffer irreparable injury, and that issuance of stay will not substantially harm other interested parties in the proceedings and the public interest).

Plaintiff also sought certification from the Trial Judge that the Court's disinclination to decide for plaintiff whether a quantum meruit claim permits a percentage of the recovery in an underlying suit, or is limited to hourly compensation only, presented a controlling issue of law for purposes of an interlocutory appeal. Plaintiff asserted in support thereof that the Court's refusal to issue a ruling on the issue (which would have been, by necessary implication, an impermissible "advisory opinion" as to what legal strategy Plaintiff ought to pursue in court), was tantamount to a ruling "that discharged counsel is limited to hourly compensation and that in order to assert an interest in the fund recovered by the client, discharged counsel must waive his right to a jury trial and proceed in equity for imposition of an attorney's charging lien." Judge McGovern denied Plaintiff's Request for Certification of Controlling Issue of Law by Order filed on October 5, 1999, or two days before the recommencement of trial.

Despite the Trial Court's announcement at the outset that ample notice had been given to all counsel that the matter was to be concluded on that date, the proceedings of October 7, 1999, began with Plaintiff's request to read an Oral Motion for Continuance into the record. (10/7/99 N.T. 4). Plaintiff then asserted as grounds for the request that there was still no "res" or fund subject to "equitable distribution" to the Plaintiff, or against which Plaintiff could litigate an equitable charging lien claim, thus divesting the court of jurisdiction to act in the matter. (10/7/99 N.T. 3-5). Plaintiff sought an indefinite continuance pending disposition of the appeal in the malpractice action, in order that the witnesses he had long been promising to present on

October 7 might instead appear when the threat of a possible retrial in the malpractice case no longer existed. (10/7/99 N.T. 5-7). Plaintiff stated at this time, that "given the posture this case is presently in and given the attitude of the Court, this matter will be on appeal very shortly" and that he desired to make a record for the appeal. (10/7/99 N.T. 7).

Plaintiff argued in support of his motion that in adjudicating an attorney's charging lien, the court was required to conduct "a thorough and all-inclusive investigation into whose efforts and whose work product is responsible for the creation of the fund that is before the court for distribution," citing to Estate of LaRocca, 431 Pa. 542, 246 A.2d 337 (1968), and Recht v. Urban Development Authority of the City of Clairton, 402 Pa. 599, 168 A.2d 134 (1961). (10/7/99 N.T. 5, 36). However, it is necessary to point out here that both of the cited cases were decided much earlier than the Superior Court's determination in Cherry v. Weiss, supra, relying upon Hiscott & Robinson v. King, supra, that no comparison of the relative contribution of each attorney to the successful outcome of an underlying lawsuit is necessary to the determination of the amount to be recovered by an attorney seeking compensation for his services.

It is also here noted, with all due respect to the plaintiff, that Estate of LaRocca, supra, was not an action by discharged counsel, but was brought by original counsel for fees earned in the creation of a trust for their client, allegedly by dint of their own efforts. There the court determined that the attorneys suing for payment for their work did not create the fund from which they were seeking compensation, but merely protected it, and suggested that an appeal for the purpose of obtaining a higher award than was

given by the court below was misadvised. Estate of LaRocca, supra, 246 A.2d at 339. LaRocca reiterated the "well entrenched rule of law" that the responsibility for determining the amount of an attorney's fee, a sometimes delicate and at times difficult question, "rests primarily with the auditing judge," whose decision will be changed only when there is a clearly shown abuse of discretion. Estate of LaRocca, supra, 246 A.2d at 339. The court also recited the time honored factors to be considered by Pennsylvania courts in determining the fee or compensation payable to an attorney: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the professional skill and standing of the attorney in his profession; the results he was able to obtain; and the ability of the client to pay a reasonable fee for the services rendered. Estate of LaRocca, supra, 246 A.2d at 339. The LaRocca court also noted that "a larger fee than usual is likewise frequently awarded when an attorney 'creates' a fund." Estate of LaRocca, supra, 246 A.2d at 339. Plaintiff averred that if he were unable to present the foregoing witnesses, the matters set forth in LaRocca could not be inquired into. (10/7/99 N.T. 10). Plaintiff's request for yet another continuance was denied.

Plaintiff's next creative tactic was to contend that since there was no "res" or fund before the court against which a charging lien could apply, that he should be allowed to withdraw this case without prejudice to his being able to refile it after the appeal in the malpractice action had been resolved. (10/7/99 N.T. 17). The defense retorted that it was not going to waive any statute of limitations issues if such were

allowed. (10/7/99 N.T. 18). Plaintiff offered no response when the Court suggested that it was apparently Plaintiff's view that the statute of limitations would not begin to run until a "res" came into existence. (10/7/99 N.T. 20). Plaintiff then presented the testimony of one of the malpractice defense attorneys who stated that he was unable to testify in this action until the appeal in the malpractice case was concluded because his client, the Hospital of the University of Pennsylvania, would not waive the attorney-client privilege. (10/7/99 N.T. 22-26). During elicitation of this witness' testimony, Plaintiff admitted to the court that the witness might also be asked to give expert testimony on Plaintiff's behalf at a later date. (10/7/99 N.T. 26).

Plaintiff next asked the court for a day in which to rethink his request to withdraw this action without prejudice. (10/7/99 N.T. 28). Judge McGovern granted the request with the caveat that, if the action were not withdrawn, there would be no other hearing, and advised counsel that any witness testimony to be proffered should be submitted in the form of depositions. (10/7/99 N.T. 29). When plaintiff expressed concern with the timing of the submissions, vis- à-vis the conclusion of the malpractice appeal, the court informed counsel that they would be given up to three weeks to submit the depositions. Plaintiff argued that evidence he intended to present was necessary in order for the court to determine "who did what before and during trial and whose efforts were responsible for the creation of the fund that is to be equitably divided." (10/7/99 N.T. 36). Plaintiff sought the admission of letters expressing successor counsel's opinion that Plaintiff should be sued for malpractice for electing to bring suit in Delaware County instead of

Philadelphia County, Pennsylvania. (10/7/99 N.T. 42). Plaintiff then submitted his pretrial memoranda in the medical malpractice case, and requested that the name of the author of the letters be added to the list of witness depositions he intended to present. (10/7/99 N.T. 44-45). Plaintiff again insisted that the Court was obligated to examine the pretrial conduct of attorneys from both sides to determine whose efforts were responsible for the creation of the fund. (10/7/99 N.T. 39-40). The court gave counsel four weeks to supplement the record as requested and to present any memoranda of law. (10/7/99 N.T. 49-50).

Despite his assertion only the day before that four weeks would be a sufficient time to complete the depositions of witnesses he intended to present in this action, Plaintiff filed, on October 8, 1999, a Motion for Voluntary Nonsuit of Claim for Attorney's Charging Lien and for Leave to Reinstate Charging Lien after fund is available for distribution. Plaintiff alleged in this Motion that the trial court had impermissibly forced him to elect between a charging lien claim and a quantum meruit action, and had refused to rule upon whether Plaintiff could obtain a percentage of the verdict in the malpractice action, or whether he was limited to hourly compensation, asserting that the Court's pretrial rulings suggested the latter. Plaintiff alleged that, under the circumstances, he had been impermissibly forced to waive a jury trial and proceed in equity on a claim for an attorney's charging lien. Plaintiff insisted that he had also been forced to try the case without witnesses because the witnesses he wished to call would be unable to testify until the appellate process in the malpractice case was concluded. Plaintiff requested a voluntary nonsuit of his charging lien case without prejudice to his ability to reinstate it after a fund

became available for distribution in the malpractice action. Plaintiff indicated at the same time that he was not seeking a voluntary nonsuit of his quantum meruit cause of action. Judge McGovern denied both this Motion and Plaintiff's "Oral" Motion for Continuance by Order filed on November 30, 1999.

Thereafter, the defendant filed, on December 23, 1999, a Motion for Compulsory Nonsuit and/or Summary Judgment, contending therein that Plaintiff had withdrawn his quantum meruit claim "in law" on April 22, 1999, the day that trial in the within action had commenced, and that Plaintiff had utterly failed subsequently to produce evidence supporting a quantum meruit theory of recovery. Defendant contended that, because Plaintiff had not yet produced the depositions he said he would in the four weeks directed by the court, Plaintiff's case was now concluded, and that judgment in defendant's favor was now called for. Defendant did concede, as hereinabove noted, that, on the evidence presented, judgment in Plaintiff's favor would be appropriate as to costs incurred in prosecuting the malpractice suit in the amount of $6,091.84.

Plaintiff provided the court, by letter dated October 23, 2000, with a courtesy copy of a "complaint in equity," captioned at number 00-10010, asserting a second charging lien action against the defendant, the Pennsylvania Medical Professional Liability Catastrophic Loss Fund, and successor counsel, for a percentage of the proceeds of Defendant's malpractice case, and seeking a preliminary injunction ordering that those proceeds be paid into court. Plaintiff's appeal of Judge Clouse's Order denying the injunction on grounds that Plaintiff was unlikely to prevail upon the merits of his claim

because this Court had already found that Plaintiff could not assert a charging lien, was withdrawn on Plaintiff's praecipe filed on April 25, 2001.

Plaintiff filed in this action, on February 2, 2000, a Motion for Reconsideration of the Court's Ruling Precluding Evidence of the Conduct of the Underlying Malpractice Trial. Plaintiff alleged in that Motion that Judge McGovern had erroneously precluded him from presenting evidence regarding how his work product had been used by successor counsel in the malpractice trial to win a jury award of $2.7 million dollars. The preclusion was contended to have occurred when the court disallowed Plaintiff from questioning the Defendant regarding the manner in which successor counsel had conducted the trial in the malpractice action. Plaintiff averred that the purpose of this line of questioning was to establish that the verdict was largely due to Plaintiff's extensive pretrial preparation and strategy which successor counsel reportedly utilized and followed totally in their conduct of trial, and that preclusion thereof amounted to manifest injustice. These contentions completely ignore the law of this Commonwealth that an award of compensation to discharged counsel need not be based upon a comparison of the relative contributions of the different attorneys who performed work on a case. Cherry v. Weiss, Schwartz, et al., supra; Hiscott and Robinson v. King, supra.

The trial court entered the following verdict in favor of the plaintiff approximately a month after the submission of the foregoing Motion for Reconsideration of the alleged evidentiary ruling:

"And Now, February 29, 2000, following a

> bench trial beginning April 22, 1999, continuing April 23, 1999, and October 7, 1999; and further the plaintiff having been afforded four weeks within which to take depositions of various witnesses; and, further, the plaintiff having voluntarily withdrawn any action in quantum meruit[, the] court in light of the record in this matter the exhibits submitted together with the memoranda hereby enters the verdict in favor of the plaintiff and against the defendant in the amount of $9,467.84."

Plaintiff's timely filed motion for post-trial relief having been denied, the Plaintiff presented the following concise statement of matters complained of on appeal:

"(1) The trial court lacked jurisdiction to adjudicate an attorney's charging lien in the absence of a final recovery in the underlying malpractice action.

"(2) The trial court refused to conduct or permit inquiry into whose efforts (plaintiff's v. trial counsel's) were responsible for defendant's success in the underlying action.

"(3) The trial court refused to permit plaintiff to conduct pretrial discovery needed to determine the relative contribution of each attorney to the success of the underlying action, including its refusal to permit plaintiff to take defendant's deposition or inspect trial counsel's file. As a result, plaintiff was unable to prepare for trial including obtaining expert testimony relative to the value of his services.

"(4) The trial court refused to rule on a controlling

question of law before trial, i.e., whether Pennsylvania law limits quantum meruit recovery to hourly compensation. As a result, plaintiff was unable to prepare for trial as he was without reasonable notice of what to prove.

"(5) The trial court ruled by implication that a discharged attorney seeking quantum meruit recovery is limited to hourly compensation.

"(6) The trial court, after refusing to rule on a controlling question of law and before there was a final recovery in the underlying action, forced plaintiff to elect between a quantum meruit action and an attorney's charging lien.

"(7) The trial court ruled that events occurring after plaintiff's discharge, including trial counsel's use of plaintiff's witnesses and work product at the trial of the underlying action, were irrelevant and inadmissible in a charging lien action.

"(8) The trial court refused to continue the trial, even after plaintiff's witness, John Luchsinger, Esquire (defense counsel in the underlying action), asserted the attorney-client privilege pending appeal of the underlying action.

"(9) The trial court misconstrued the nature of an attorney's charging lien by ruling, expressly and/or by implication, that a charging lien action is a garnishment proceeding in which a fund or "res" is relevant only for purposes of execution.

"(10) The trial court refused to grant plaintiff's motion for a voluntary nonsuit with leave to reinstate

the action after there was a final recovery in the underlying action.

"(11) The Delaware County Court authorized, committed and caused an 'unlawful taking' of plaintiff's property in violation of due process and state/federal constitutional rights by ordering plaintiff to surrender his entire work product to defendant's trial counsel, permitting its beneficial use by defendant and his counsel in the underlying action, and then refusing to award any compensation whatsoever to plaintiff for his professional services." (Plaintiff's concise statement of matters complained of on appeal, pp. 1-2.)

1. Evidentiary and Discovery Matters

Previous discussion has shown that a number of Plaintiff's evidentiary issues must be deemed completely lacking in merit for purposes of this appeal. The first of these is the contention in Paragraph Two of the Concise Statement regarding refusal of the trial court to allow inquiry into whose efforts were responsible for defendant's success in the medical malpractice action. The Pennsylvania Superior Court has ruled in one of plaintiff's own lawsuits that it is not necessary for a court deciding a claim for attorney fees to make such a comparison. Cherry v. Weiss, et al., supra, citing to Hiscott and Robinson v. King, supra. Plaintiff's recalcitrant refusal to accept these rulings simply cannot make the contrary a reality. Moreover, the Trial Court cannot be faulted for limiting plaintiff's attempt to elicit testimony of this nature from the defendant, because Mr. Zucker, who is not an attorney himself, was neither qualified to evaluate those efforts, nor to testify on such a matter of law. (4/23/99 N.T. 259).

Finally, there was no prejudice to Plaintiff from the preclusion because he had submitted lengthy testimony of his own regarding his efforts to secure the testimony of the expert who, the Defendant testified, without objection, was the key witness in the malpractice trial. (4/23/99 N.T. 257).

The second discovery issue is set forth in Paragraph Three of the Concise Statement, wherein Plaintiff alleges that "the trial court refused to permit plaintiff to conduct pretrial discovery needed to determine the relative contribution of each attorney to the success of the underlying action, including its refusal to permit plaintiff to take defendant's deposition or inspect trial counsel's file." Plaintiff contends that, "[a]s a result, plaintiff was unable to prepare for trial including obtaining expert testimony relative to the value of his services." However, there is absolutely no indication in the record that the trial court refused or disallowed any discovery of that sort in this action, and indeed, there is every indication that Plaintiff was never limited in the obtaining of deposition testimony of successor counsel for submission to the court. No protective order was issued in that regard on motion of the Defendant, and the Court issued none on its own. It is also clear that whatever depositions, if any, that Plaintiff obtained from successor counsel, were never presented to the court, nor made part of the record, as was Plaintiff's stated intention at the conclusion of trial. Plaintiff's neglect in preparing and presenting his evidence cannot be laid at the doorstep of the Court.

The ruling against obtaining discovery of successor counsel's work product and Defendant's client file, complained of in Paragraph Seven of the Concise Statement, was decided by the Court in the

case of Cherry v. Weiss, et al., supra, and was upheld on appeal for reasons previously set forth in this opinion. Finally, the record clearly adduces that Defendant's motion to preclude Plaintiff's expert from testifying in this case was denied, but that Plaintiff never proffered the expert's testimony during any of the three days of trial, nor at any time thereafter. Therefore, Plaintiff's claim of inability to obtain or prepare an expert smacks of disingenuity. It is likewise clear from the record that Plaintiff was ordered by the trial judge in his malpractice case, and not by Judge McGovern, to turn over his case file to successor counsel. Therefore, Judge McGovern cannot be charged with an "unlawful taking" of plaintiff's property as set forth in Paragraph Eleven of Plaintiff's Concise Statement of Matters Complained of on Appeal.

The law is well-settled that the decision to admit or exclude evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. The test to be applied in determining the admissibility of such evidence involves weighing any prejudicial nature of evidence against its relevance and essential evidentiary value. Concorde Investments Inc. v. Gallagher, 345 Pa. Super. 49, 56, 497 A.2d 637, 641 (1985); Walasavage v. Marinelli, 334 Pa. Super. 396, 483 A.2d 509 (1984). The court may exclude evidence that is irrelevant, confusing, misleading, cumulative or prejudicial. Keough v. Republic Fuel and Burner Co. Inc., 382 Pa. 593, 116 A.2d 671 (1955); Yost v. Union R. Co., 380 Pa. Super. 236, 551 A.2d 317 (1988). It is respectfully submitted, for all of the foregoing reasons, that the Trial Judge's rulings of record were not in error, and that those without support in the record were simply not made.

2. Plaintiff's Action for Fees

a. The Charging Lien Claim

Plaintiff contends in Paragraph One of the Concise Statement that the trial Court lacked jurisdiction to adjudicate an attorney's charging lien in the absence of a final recovery in the underlying malpractice action. This mischaracterizes the role of the court and ignores the responsibility of Plaintiff to show first that there is a fund in court by dint of his own efforts, and secondly that he is entitled to a portion thereof. It is the law of this Commonwealth that, even if it can be said with relative certainty that there will be a fund in court in the future, the court must have sufficient evidence to determine whether it came about due to the services of the attorney. Carb v. Allen, 12 Pa. D. & C.4th 630 (1991). It is also true that an attorney cannot realize a charging lien where there is no fund in court. It is undisputed that there was no fund in court or otherwise available during the course of this litigation, nor is there sufficient evidence that any fund that might come into the court was procured substantially by and through the services of the Plaintiff who did no work in the case for some two years prior to the verdict. Nevertheless, reviewing the equitable principles involved in determining the appropriateness of a charging lien adduces that such a lien should not be granted to a discharged attorney where successor counsel concluded the case and where an action against the client in quantum meruit may lie, as here. In re Callahan Settlement Proceeds, 6 Pa. D. & C.4th 637 (1989).

An attorney is entitled to a charging lien if:

"(1) ... there is a fund in court or otherwise applicable for distribution on equitable principles,
(2) ... the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid,
(3) ... it was agreed that counsel look to the fund rather than the client for his compensation,
(4) ... the lien claimed is limited to costs, fees, or other disbursements incurred in the litigation by which the fund was raised, and
(5) ... there are equitable considerations which necessitate the recognition and application of the charging lien." Recht v. Clairton Urban Development Authority, 402 Pa. 599, 608, 168 A.2d 134, 139 (1961).

Applying these criteria to the facts in the instant case, Plaintiff would not be entitled to a charging lien. In Johnson v. Stein, 254 Pa. Super. 41, 385 A.2d 514 (1978), a fee dispute arose between two attorneys, one of whom had been previously employed by the same law firm. The plaintiff attorney had represented the plaintiffs in a tort case on a contingent fee basis. At the time he began his representation, he was an associate in the defendant's firm and had been assigned to work on the case. Prior to settlement, the plaintiff was discharged, but the case remained in defendant's office. Thereafter, the defendant negotiated a settlement. The plaintiff filed a notice of attorney's lien, and the defendant paid the proceeds of the settlement into court. The trial court entered an order striking plaintiff's attorney's lien and plaintiff appealed. The Superior Court upheld the trial court's decision. After citing the requirements for a charging lien as set forth in Recht, supra, it found

that the fifth requirement had not been met. The court explained that:

> "Requirement (5) focuses attention on the fact that there must be 'considerations which necessitate' imposition of a lien if the attorney whose efforts brought about the existence of a fund is to be paid for his services." Johnson at 44, 385 A.2d at 516.

The Superior Court in Johnson went on to explain that the imposition of a charging lien is based on the court's interest in protecting attorneys as officers of the court and making sure that a client does not reap the fruits of the settlement without compensating the attorney without whose effort the settlement would not have been obtained. Id. Therefore, the court continued, a charging lien will be imposed "where the fund from which the attorney's fee is to come would be depleted by creditors with prior claims, leaving the attorney unpaid and unable to recover against his client.... Where considerations of protecting the attorney do not necessitate imposition of a lien, the court will not impose one." Id. The court cited several factors to be used in determining whether conditions which necessitate imposition of a lien exist. They are, whether a client is attempting to defraud counsel; whether the client is insolvent; whether an adverse or third party is attempting to appropriate the fund; and, citing U.S. v. Fidelity Philadelphia Trust Company, 459 F.2d 771, 778 (3d Cir. 1972), whether there is anything in the record to indicate that the attorney is or will be precluded from pressing his claim directly against his client. Johnson at 45-46, 385 A.2d at 516. Here, the plaintiff was never foreclosed from and, indeed, pursued a claim of quantum meruit against

his client, and a charging lien should therefore not be imposed.

Plaintiff relies upon the case of Recht v. Clairton Urban Development Authority of the City of Clariton, supra, for the proposition that equitable principles set forth therein mandated a charging lien on the malpractice verdict be granted in his favor. However, the court there found that the attorney who took no part in the preparation of an appeal and trial de novo in an eminent domain action was not entitled to assert a charging lien against the jury verdict obtained by new counsel in the de novo trial. Thus, the principles set forth in Recht would not support plaintiff's assertion of a charging lien against a verdict obtained by successor counsel. Therefore, it is respectfully submitted, that under the circumstances presented here, plaintiff would not have been entitled to assert a charging lien against the underlying verdict in any event.

Plaintiff contends in Paragraph Six of his Concise Statement that "the trial court, after refusing to rule on a controlling question of law and before there was a final recovery in the underlying action, forced plaintiff to elect between a quantum meruit action and an attorney's charging lien." As has been hereinabove noted, the Trial Judge was not obligated to provide Plaintiff with the answer to a question he could determine for himself. Neither did the Court force Plaintiff to proceed on any cause of action. The decision to litigate and try the case as he did was solely that of the Plaintiff.

Plaintiff contends in Paragraph Nine of his Concise Statement that, "the trial court misconstrued the nature of an attorney's charging lien by ruling,

expressly and/or by implication, that a charging lien action is a garnishment proceeding in which a fund or 'res' is relevant only for purposes of execution. There is no such ruling of record in fact, and/or by implication.

For all of the foregoing reasons, Plaintiff's contentions of error or abuse of discretion by the Trial Court with regard to the claim of equitable charging lien are unfounded in fact and in the law. Because Plaintiff possessed and was litigating a claim in quantum meruit against his former client, he would not have been allowed to assert a charging lien against the verdict in the underlying suit. Whether or not there was a fund or "res" in court, and whether or not the action was properly before the court, would have availed the Plaintiff nothing.

b. Quantum Meruit

It is abundantly clear from all the facts and circumstances of this case that Plaintiff filed suit too early, and that, had he waited a longer period of time, he would not have had to wage the serpentine battle he's waged to prevent the extinguishment of the light on his claim of eligibility for a portion of the underlying recovery. Plaintiff's services were terminated by the Defendant by letter dated in February of 1995. The verdict in the malpractice case was delivered in May of 1997. Plaintiff initiated the instant action only a month later, when he could have waited until February of 1999 to initiate suit and continue to be engaged in litigation thereof when the jury's verdict was upheld by the Pennsylvania Superior Court in December of 2000. Nevertheless, a claim in quantum meruit would not guarantee Plaintiff a percentage of the recovery that was set

forth in his fee agreement with the Plaintiff. However, the Trial Judge determined, in the interest of justice, the Plaintiff was entitled to reimbursement of his expenses, because these had never been refuted, nor seriously disputed by the defendant.

Under Pennsylvania law, a client has the absolute right to terminate the attorney-client relationship regardless of any contractual relationship between the two parties. Hiscott and Robinson v. King, supra; Kenis v. Perini Corp., 542 Pa. Super. 634, 682 A.2d 845 (1996); Fowkes v. Shoemaker, 443 Pa. Super. 343, 661 A.2d 877 (1995). Where a party has effectively terminated an attorney's representation before the conclusion of an action, under the circumstances presented here the attorney has a cause of action to recover compensation from the client for work done on the case and not from successor counsel, as plaintiff attempted in Cherry v. Weiss, et al., supra; Kenis v. Perini Corp., 542 Pa. Super. at 642, 682 A.2d at 849; Styer v. Hugo, 422 Pa. Super. 262, 619 A.2d 347 (1993), aff'd, 535 Pa. 610, 637 A.2d 276 (1994). The statute of limitations for a quantum meruit action is four years from the date of termination of the attorney's representation, and amendment of a pleading to add such an action will not be permitted after the four years limitations period has run. 42 Pa.C.S. §5525(4); Kenis v. Perini Corp., supra; Fowkes v. Shoemaker, supra. Therefore, Plaintiff's attempts to withdraw any claim for fees without prejudice, in the face of Defendant's refusal to abandon the statute of limitations defense, would have been seriously misadvised. Hence, the contention set forth in paragraph Ten of the Concise Statement alleging wrongful refusal by the Court to grant plaintiff's motion for a voluntary nonsuit with

leave to reinstate the action after the malpractice case appeal was concluded is utterly baseless.

Plaintiff insists that he could not litigate a claim for quantum meruit when there was no "res" in court. However, it is the law that no fund in court is necessary to prevail on an action in quantum meruit, because the claim can be brought even when the party from whom compensation is sought has not prevailed in court. Indeed, Plaintiff recognized this contingency when averring in paragraphs 29 and 30 of his Amended Complaint that, "if there is no recovery in the malpractice action, Plaintiff still seeks quantum meruit recovery for the reasonable value of his professional services rendered to Defendant up to the date of discharge plus expenses of litigation." Plaintiff is simply not foreclosed from seeking compensation pursuant to a contingent fee agreement which Defendant prevented him from honoring when terminating Plaintiff's employment.

It is settled in the law that a ten factor test is to be applied in determining the amount of any quantum meruit recovery, i.e. (1) the amount of work performed; (2) the character of the services rendered; (3) the difficulty of the problems involved; (4) the importance of the litigation; (5) the amount of money or value of the property in question; (6) the degree of responsibility incurred; (7) whether the fund involved was created by the attorney; (8) the professional skill and standing of the attorney in his profession; (9) the results he was able to obtain; and (10) the ability of the client to pay a reasonable fee for the services rendered. Estate of LaRocca, supra, 431 Pa. at 546, 246 A.2d at 339. Plaintiff asserts in Paragraph Four of the Concise Statement that in refusing to state whether Pennsylvania law limits quantum meruit

recovery to hourly compensation, the trial court rendered Plaintiff unable to prepare for trial as he was without reasonable notice of what to prove. The statement is, in a word, ridiculous. The law is clear and easily accessible to the Plaintiff, a licensed and practicing attorney, who alone had the burden of proving his case in court.

Further, contrary to Plaintiff's assertion in Paragraph Five of the Concise Statement that the trial court ruled "by implication," that a discharged attorney seeking quantum meruit recovery is limited to hourly compensation alone, there is no such ruling anywhere in the record, nor was one ever made in fact. The law is clear that the amount of work performed is only one of numerous factors to be considered in deciding a quantum meruit award. There is no allegation from Plaintiff that the Court ever misstated the law as it concerns the factors that needed to be considered in a ruling as to what Plaintiff may have been entitled to under this theory of recovery. It is also the law that attorney billing records are not necessary to prove a charging lien in a contingency fee case where hourly billing records are routinely not kept, and where recovery of the lien is governed by the equitable principles under which a lien to Plaintiff would have been disallowed. Molitoris v. Woods, 422 Pa. Super. 1, 618 A.2d 985 (1992).

The same factors listed in Estate of LaRocca, supra, are to be considered in determining the fee to be paid to an attorney asserting a charging lien. Therefore, Plaintiff's contention in Paragraph Seven of the Concise Statement that the Trial Court committed error in ruling that "events occurring after plaintiff's discharge, including trial counsel's use of

Plaintiff's witnesses and work product at the trial of the underlying action were irrelevant and inadmissible" is utterly unfounded. Recovery in quantum meruit need not be based on hourly records in a contingency fee case where they are routinely not kept because there are numerous other factors that may be considered by a court in determining a reasonable fee. Mulholland v. Kerns, 822 F. Supp. 1161 (E.D. Pa. 1993). Quantum meruit is a very fact sensitive determination and Pennsylvania courts may find other ways to calculate attorney fees in whatever way seems most reasonable, so long as they adhere to the standards put forward in Estate of LaRocca. Mulholland v. Kerns, supra, 822 F. Supp. at 1169. Plaintiff has presented no citation to the record where he was advised to the contrary. Therefore, his self-serving accusation in that regard must be deemed meritless, as must his contentions that the Court, and not he, had the responsibility of determining which remedy he needed to pursue, and of researching those remedies in the law.

3. Refusal to Grant Continuance

Plaintiff alleges in Paragraph Eight of his Concise Statement that "the trial court refused to continue the trial, even after plaintiff's witness, John Luchsinger, Esquire (defense counsel in the underlying action), asserted the attorney-client privilege pending appeal of the underlying action." Plaintiff claims that this refusal operated to deprive him of his federal constitutional right to his day in court and of the ability to prove that he, and not successor counsel, was primarily responsible for the successful outcome of the malpractice trial and the creation of any fund that resulted. The record nevertheless evinces that Plaintiff was given four

weeks in which to obtain the deposition testimony of Mr. Luchsinger and that of the other witnesses he intended to present to prove his claim for attorney fees. The trial court did not deprive Plaintiff of the opportunity to present the testimony of his witnesses, Plaintiff did. The Trial Court did not prevent plaintiff from proving his claim, the Plaintiff abrogated that responsibility entirely on his own.

The grant or refusal of a request for a continuance is within the discretion of the trial court and only where such discretion has been abused will the refusal of a continuance be reversed. Birdsall v. Carbon County Board of Assessment & Revision of Taxes, 168 Pa. Commwlth. 266, 649 A.2d 740 (1994); Phoenix Mutual Life Insurance Company v. Radcliffe on the Delaware Inc., 439 Pa. 159, 266 A.2d 698 (1970). Four factors are used to determine whether a continuance was properly denied: (1) whether the delay prejudiced the opposing party; (2) whether opposing counsel was willing to continue the case; (3) the length of the delay requested; and (4) the complexities involved in presenting the case. Snyder v. Port Authority of Allegheny County, 259 Pa. Super. 448, 393 A.2d 911 (1978). Plaintiff does not argue any of these factors, nor can he show that he was not granted additional time to present his case. Counsel for the Defendant opposed the indefinite continuance proposed by the Plaintiff, and Plaintiff later acquiesced to the allowance of four additional weeks following the third day of testimony to prepare and present the deposition testimony of additional witnesses he desired to present. There were no complexities which would warrant a continuance without end in this case which was first called to trial on March 16, 1998 and which had previously been continued nine times. Plaintiff had presented lengthy

testimony and numerous exhibits adducing the work he had done in the malpractice action. A comparison of work done by successor counsel on the case was not necessary to determine recovery in quantum meruit. Because Plaintiff was engaged in litigating a quantum meruit action against his client, equity would not grant him a charging lien. For all of the foregoing reasons, it is submitted that an indefinite stalling of the completion of trial in this action until the malpractice case appeal had been resolved was utterly unnecessary.

Conclusion

Plaintiff sought post-trial relief in the form of vacating the Verdict and reinstating Plaintiff's quantum meruit claim against the Defendant. However, the court never dismissed Plaintiff's claim for quantum meruit, and the evidence of the amount of any fee to be awarded on a charging lien claim would, in any event, have been the same. The evidence presented by Plaintiff during the three days of trial provided a sufficient basis from which the court, exercising its sound discretion, could fairly and justly conclude that he was entitled to reimbursement from the Defendant only for the expenses incurred in the underlying action prior to termination of his employment.

Plaintiff takes no issue with the amount set forth in the Verdict, nor with the fact that this sum was awarded at all. Plaintiff is entitled to this sum, under law, whether or not there is a fund or "res" before the court or otherwise available, based upon the contingency fee agreement with Defendant and the intentions of the parties. In short, Plaintiff wants merely to proceed with a claim he has already

established, against a Verdict he has already won. Plaintiff's election to present no further evidence in support of his plea for compensation was his own. For all of the foregoing reasons, it is respectfully submitted that the relief sought here has already been awarded, and that the Trial Court's verdict should be sustained.

BY THE COURT:

_____

Charles B. Burr, II

J. A31005/02

GARLAND D. CHERRY, JR., ESQUIRE, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
EDWARD L. ZUCKER Appellee	:	NO. 2577 EDA 2000

Appeal from the Judgment entered October 23, 2000 in the Court of Common Pleas of Delaware County, Civil Division, at No. 96-2625

BEFORE: DEL SOLE, P.J., ORIE MELVIN AND BECK JJ.

MEMORANDUM: Filed DECEMBER, 2002

This is an appeal from a judgment entered following a non-jury trial. Appellant, Appellee's former attorney, filed a claim seeking fees owed for his work on a medical malpractice lawsuit he commenced for Appellee, which was successfully litigated by another attorney. The facts of this case are complicated due to irregularities in Appellant's procedural tactics. However, it appears that, at the conclusion of the trial, Appellant had no remaining outstanding claims, but was awarded $9,467.84 in undisputed costs as a matter of judicial economy.

Appellant now complains he was forced by the trial court into legal theories he was unprepared to pursue and demands a new trial. A review of the record reveals Appellant repeatedly attempted to have the trial court counsel him in his prosecution of

this case. Further, a review of his arguments both at trial and to this Court reveals no new or different evidence he desires or is prepared to introduce at a new trial. Appellant had his day in court, at which he was permitted to litigate his case in any proper, available manner and at which he introduced all the competent evidence he had. The trial court gave him the only verdict available on the evidence before it, and we will not disturb it on appeal.

As to the issues raised on appeal and properly preserved in the 1925 Statement of Matters Complained of on Appeal, we find the trial court adequately and accurate found them to be without merit, and thus we affirm the judgment on the basis of the trial court opinion dated January 18, 2002. We briefly note that we find no merit to Appellant's new claim that the trial judge who prepared the trial court opinion was improperly influenced by the retired trial judge who presided over the trial.

Judgment affirmed.

Judgment Entered.

_____

Prothonotary

Date: December 31, 2002

ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED MAY 29, 2003

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

GARLAND D. CHERRY, JR., ESQUIRE,	:	No. 71 MAL 2003
Petitioner	:	Petition for Allowance of Appeal
v.	:	from the Order of the Superior Court
EDWARD L. ZUCKER	:	
Respondent		

ORDER

PER CURIAM

AND NOW, this 29th day of May 2003, the

Petition for Allowance of Appeal is DENIED.

TRUE AND CORRECT COPY
ATTEST: May 29, 2003

_____
Shirley Bailey
Chief Clerk

2 329
Supreme Court, U.S.
FILED
OCT 2 2003
OFFICE OF THE CLERK

No. 03-~~382~~

In The

Supreme Court of the United States

GARLAND D. CHERRY, JR.,

Petitioner,

v.

EDWARD L. ZUCKER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

The trial court opinion sets forth a factual and procedural history in its first eighteen pages. A copy of the opinion is set forth in the Petition for Writ of Certiorari.

Cherry first instituted this lawsuit against Zucker with the filing of a Complaint on March 7, 1996. (R.1a) The case was first listed for trial on November 7, 1997, when Plaintiff asked for the matter to be moved from the list because it had settled. (R.118a) Cherry's case was relisted for trial on March 15, 1998, July 27, 1998, January 4, 1999, February 8, 1999 and April 10, 1999. Each time Cherry either requested a continuance or filed a Motion, which resulted in a continuance of the trial date. (See Trial Court Opinion) The trial finally commenced on April 23, 1999 with testimony from Cherry and Zucker. Once again the trial had to be continued since Cherry indicated he had no additional witnesses. (R.428a) Trial was specially listed to resume on October 7, 1999 and Cherry appeared once again without any witnesses. (R.6a, 10a) The court granted him four additional weeks to supplement the record with trial deposition testimony. (R.500a) During those four weeks, Cherry neither scheduled nor conducted any trial depositions.

It is interesting that Cherry's handling of Zucker's medical malpractice case followed a similar pattern. Cherry first filed suit by Writ on January 9, 1991. (R.271a-272a) The underlying medical malpractice case was first listed for trial on November 15, 1993 with Judge Clouse. (R.294a) The case was not ready for trial from Plaintiff's perspective at that point. (R.295a) The case was then assigned to the number one position on the trial list commencing April 25, 1994. (R.297a) Again the case was

not ready for trial. (R.297a) At that time the Plaintiff had no testimony from an economist or any professional sport witnesses for the damage aspect of the case. (R.302a, 303a) The case was then relisted for trial for January 9, 1995 before Judge Fitzpatrick. (R.304a) Cherry wrote to Judge Fitzpatrick requesting a continuance since "discovery is still in progress". (R.306a) Cherry's legal services were then terminated by Zucker in a letter dated February 21, 1995. On January 31, 1995, Cherry sent a letter to defense counsel stating that he would produce an expert economist to testify regarding future loss income. (R.352a-353a) As of that date, which was more than one year after the case was first listed for trial, Cherry had no economic report nor had he contacted any other damage witnesses. (R.351a)

The only expert witness that Cherry had a report from was Dr. Gessman, who was a treating cardiologist. At the time of trial, Zucker testified that Dr. Gessman, Dr. Kalish and Dr. Freelander testified as medical experts for the Plaintiff. (R.424a-425a) Thus, Cherry's statements that he had worked the case nearly to completion and was ready for trial is not accurate. After new counsel for Zucker entered his appearance, the case ultimately proceeded to trial in the spring of 1997, some two years after Cherry's withdrawal from representing Zucker.

The only evidence presented in Cherry's case against Zucker was Cherry's own testimony and that of Zucker on cross-examination. Cherry presented absolutely no evidence concerning the reasonable value of his legal services, the amount of time spent on any legal tasks while representing Zucker or his billing rates. In addition, Cherry presented no testimony from any source such as another attorney who could have testified as an expert,

reviewed Cherry's file and given an opinion as to the value of Cherry's legal services. The court entered a verdict in favor of Cherry for his legal costs and expenses, which included the payments to New Jersey counsel and paralegals. This was the only evidence presented by Cherry concerning the value of legal services rendered to Zucker.

SUMMARY OF ARGUMENT

Cherry states he was denied his substantive due process rights because he was not given any compensation for his legal services in representing Zucker. The trial court did not award Cherry compensation for his legal services because Cherry failed to sustain his burden of proof. Cherry presented absolutely no evidence concerning the reasonable value of his legal services, the amount of time spent on any legal task in representing Zucker or his billing rates. In addition, he presented no expert testimony concerning the value of his legal services.

He also complained that he was denied his procedural due process rights because the trial judge failed to continue his case pending in the appeal of the underlying malpractice action. In fact, the trial court bent over backwards granting Cherry nine (9) continuances for the trial. There was absolutely no reason to continue Cherry's trial during the appeal of the underlying malpractice action. Cherry's claim against Zucker was for a *quantum meruit* recovery and was not dependent upon the results of the appeal in the underlying action.

ARGUMENT

WHETHER CHERRY WAS DENIED HIS SUBSTANTIVE DUE PROCESS RIGHTS

Cherry essentially argues that he was denied his substantive due process rights under the 14th Amendment when he was not given any compensation for his legal services in representing Zucker. Cherry was denied compensation at the conclusion of the trial because he failed to sustain his burden of proof by not presenting sufficient evidence for the Court to render an award. At oral argument on the post trial motions, the post trial judge stated the following as to why the trial judge denied compensation:. . . . "that might very well have been because you did not sustain your burden, at least in his view, of substantiating the value of what your services were, not so much that you did not do any preparation in the case to prepare for trial, but that you did not give him some rational basis on which to award you attorney's fees (Supp.R. pp. 588a-589a, also, footnote 9 in Petition for Writ for Certiorari). Even Cherry acknowledges that there may not have been a sufficient record in which to make a definitive award of compensation when he states that "Despite this, the Court denied any compensation to petitioner apparently because, in the Court's view, it did not have a sufficient record before it upon which to make a definitive award of compensation . . . (Petition for Writ for Certiorari, pg. 20)

During oral argument on the post trial motions, Judge Burr inquired as to how a court could place a valuation on the legal services rendered when there was no expert testimony nor any other testimony that would give the court some rational basis on which to award attorney's fees. (R.581b-590b) It has been held that where damages are susceptible of being proved, the amount must be

established with some certainty. *Aiken Industries, Inc., v. Estate of Wilson,* 383 A.2d 808, 813, 477 Pa. 34 (1978); *Solar Electric Corp. v. Exterminator Corp. of America,* 384 Pa. 233, 120 A.2d 533, 534 (1956).

WHETHER CHERRY WAS DENIED ANY PROCEDURAL DUE PROCESS RIGHTS

Next Cherry complains that he was denied his procedural due process rights because the trial judge failed to continue his case while the appeal of the underlying malpractice action was pending. Cherry indicated that this was necessary so that highly relevant evidence could be introduced in his compensation action, i.e., the use of his work product and the results obtained in the malpractice action.

The result obtained in the malpractice action, namely, a $2.7 million verdict in favor of Zucker was admitted into evidence. (R.224a) Any evidence as to whether Cherry's work product was used during the malpractice trial was excluded by the court for a number of reasons. First, there was no testimony that Cherry attended the trial or reviewed any trial transcripts. (R.254a) Thus, there was no foundation for Cherry to testify that his work product was used at the malpractice trial. Second, the Superior Court has already rejected the argument that an award to discharged counsel should be based on a comparison of the relative workload of different lawyers on a case. *Hiscott and Robinson v. King,* 426 Pa.Super. 338, 626 A.2d 1235, 1237 (1993). Finally, it would be mere speculation as to whether Cherry's work product was instrumental in obtaining a specific jury award. There were at least three medical experts who testified along with a number of

damage experts in the malpractice trial. Cherry was only involved with one medical expert who also happened to be a treating physician and was initially contacted by Zucker. It would be mere speculation to argue that any one witness or single item of evidence produced a particular jury verdict.

Thus, there was absolutely no reason for the trial court to continue Cherry's lawsuit until the underlying malpractice case was decided by the Superior Court. Cherry's lawsuit against Zucker for legal services was filed in 1996 and was not concluded until the bench verdict in February of 2000. Obviously, Zucker also had a right as a Defendant to have his case against him heard in a timely fashion. There was absolutely no prejudice to Cherry when the court refused to continue his action for a *quantum meruit* recovery. Cherry's claim for *quantum meruit* compensation was not dependent in any manner upon the decision of the Superior Court in the underlying malpractice verdict. The lower court found that there were no complexities which would warrant a continuance without end in this case which was first called to trial on March 16, 1998 and had previously been continued nine times. See *Snyder v. Port Authority of Alleghany County,* 259 Pa.Super. 448, 339 A.2d 911 (1978).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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